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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, LATE OF HAMDEN, DECEASED,

Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER AND APPENDIX

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut is reported at 222 F. Supp. 446 and is also printed in the record. (R. 86-107)

The opinion of the Court of Appeals for the Second Circuit is reported at 351 F.2d 489 and is also printed in the record. (R. 114-124)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on September 28, 1965. (R. 124) The petition of The Second National Bank of New Haven as Executor aforesaid for a rehearing and its suggestion for rehearing in banc were denied on March 21, 1966. (R. 125) The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Connecticut statutes prescribe that federal and Connecticut estate taxes paid by a decedent's estate are to be equitably prorated among persons interested, i.e., donees of taxable inter-vivos transfers, pecuniary and specific legatees and recipients of the residue. If a particular gift does not generate any estate taxes because of the marital deduction or its charitable character, no estate taxes can be prorated against it. The statute applies to every estate paying such taxes, unless the testator in his will has clearly and unambiguously directed otherwise.

The marital deduction allowable under the federal estate tax law is limited to fifty per centum of the adjusted gross estate or to the net value of properties passing without charges or encumbrances from the decedent to the surviving spouse, whichever is the lesser. In proration proceedings in this decedent's estate, the probate court fixed by decree the amount

of property actually distributable to the widow; it was less than the fifty per cent ceiling. No appeal was taken, and the decree became a final adjudication of the amount of the widow's share. In so doing, the probate court ruled that the apportionment statute was applicable with respect to residuary gifts, for lack of a clear and unambiguous testamentary direction to the contrary; thereby the widow's share was relieved of the burden of the estate taxes generated by the properties in the residue.

The Internal Revenue Service did not recognize the probate decree as a final adjudication of the right of the widow, under Connecticut law, to receive her residuary share free of estate taxes attributable to residual properties. It asserted her share was subject to such taxes, thereby reducing the amount of the marital deduction and increasing the estate taxes assessable against the estate. A deficiency in taxes was assessed on this account, and this suit seeks a refund of the additional taxes paid.

Two questions are presented for review:

(1) Whether the law of the State of Connecticut requires the apportionment statute to be applied and estate taxes prorated as between the residuary gifts because the testator did not clearly and unambiguously direct otherwise?

(2) Whether the probate decree was a final adjudication of the widow's property rights entitled to full faith and credit and conclusive in assessing federal estate taxes?

STATEMENT OF THE CASE

Petitioner is the sole executor of the will of Frederick F. Brewster, a resident of Connecticut, who died on September 16, 1958. The decedent's will and a codicil thereto were admitted to probate by the Probate Court for the District of Hamden, Connecticut, on October 6, 1958. The will was originally executed on June 5, 1958. Article One provided:

> "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."
>
> (R. 12)

The remainder of the will provided certain pecuniary or specific bequests to his wife and others and left the residue in trust. In Article Nine of the will the testator stipulated that one-third of the residue was to be held in trust during the life of his wife, Margaret F. Brewster, and the income paid to her. Upon her death the trust was to terminate, and the corpus was to be paid in equal shares to three children, or their issue. The other two-thirds of the residue was to be held in trust for the benefit of all the decedent's grandchildren living upon his death. (R. 16-18)

On July 1, 1958, within a month of the execution of his original will, the decedent executed a codicil thereto by which he altered the provisions of his original will in two respects. (R. 23, 24) First, he amended Article Two of the will in which he had provided that certain expenses that might arise

in connection with certain charitable gifts were to be paid from the principal of the widow's trust. (R. 23) The codicil deleted the provisions for payment from the widow's trust and instead created a separate trust with the income and principal to be used to meet such expenses. The second alteration in the will related to the widow's trust. The decedent specified that in addition to the income of the trust for life, his wife was to receive a general testamentary power of appointment over the corpus of the trust (*i.e.*, one-third of the residue). In default of appointment, the corpus of the trust was to be paid over, as provided in the original will, to three of his children, or their issue. By this change, the decedent qualified the widow's trust for the marital deduction provided by Section 2056 of the Internal Revenue Code of 1954 and tax exemption. The testator stated in the codicil that "In all other respects I hereby republish and confirm my said will." (R. 24)

On December 16, 1958, the petitioner and another executor, who later resigned, filed a federal estate tax return reporting an estate tax liability of $4,028,613.85 based upon a gross estate of $13,201,347.90 and a taxable estate of $8,392,892.80. (R. 50, 53, 61) The return claimed as part of the marital deduction the corpus of the widow's residuary trust. (R. 58) This was computed as one-third of the residue before the payment of estate taxes attributable to residuary properties. In essence the widow's allowance, the pre-residuary legacies and taxes thereon, the debts and administration expenses were deducted from the total probate estate; one-third of the remainder was allocated to the widow's trust which was then reduced by the state succession taxes levied against it. (R. 56-58)

On October 18, 1961, following an audit of the estate tax return, the District Director of Internal Revenue forwarded to

the executors a so-called "30-day letter" [1] showing a deficiency due in the amount of $1,336,468.40. (R. 66) This deficiency resulted principally from two determinations made by the District Director: the disallowance of the widow's allowance as part of the marital deduction and the reduction of the marital deduction for the widow's trust from $3,630,243.95 to $1,682,846.59. (R. 69, 70) The latter adjustment was based on the District Director's determination that estate taxes should not be prorated between residuary gifts and that the widow's trust should receive one-third of the residuary estate computed after the payment of all federal and state death taxes, including the estate taxes generated by the residuary properties. (R. 70)

Upon filing the federal estate tax return in December 1959, the executors had paid the estate tax reported due, *i.e.* $4,028,613.85. (R. 49) On November 10, 1961 the executors filed an application in the probate court to determine the proration of the federal estate taxes paid. Since all such taxes attributable to non-residuary gifts were recognized as payable out of the residue by express direction of the testator, proration could relate only to residuary shares. The total federal estate tax attributable to the residuary properties and subject to proration was $3,832,550.45. (R. 29-35)

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[1] Such a letter is an intermediate step preceding the issuance of a "90-day letter" or statutory notice of deficiency. The letter informs the taxpayer of certain rights of appeal within the Internal Revenue Service. The function of a 30-day letter is described in Section 601.150(d) of Statement of Procedural Rules (Internal Revenue Service) (26 C.F.R., Sec. 601.105 (d)).

Notice of the application and hearing thereon was given, *inter alia*, to the decedent's widow, two adult grandchildren who were beneficiaries of residuary trusts, the guardian-ad-litem for the seven minor grandchildren also beneficiaries of residuary trusts, and the District Director of Internal Revenue at Hartford. (R. 75, 76) The District Director was also furnished with a copy of the executors' application and computation of the proposed proration they deemed necessary. (R. 8, 84)

The guardian-ad-litem, an attorney-at-law, filed his report under oath stating that there were no legal objections to the proration of the federal estate tax as set forth in such application and in his letter transmitting the report to the Judge of Probate, he stated the grounds for his opinion. (R. 77, 80)

Neither of the adult grandchildren nor the District Director of Internal Revenue appeared at the hearing or made their positions known to the probate court. (R. 80) Subsequent to the hearing and on December 26, 1961 the probate court filed a memorandum of decision approving the executors' proposed proration and entered a decree in which it:

> "ORDERED, that the federal estate tax be prorated in the manner and in the amounts set forth in said application and that said Executors are authorized, empowered and directed to charge the prorated amounts against the persons against whom the tax is so prorated as set forth in said application."
>
> (R. 80-81)

Thereafter the Commissioner determined and assessed a deficiency in the amount of $1,333,194.35 tax plus $195,285.58 interest, ruling that the widow's allowance did not qualify for the marital deduction and finding that the amount of the marital trust was as stated in the 30-day letter. (R. 9) The peti-

tioner paid the deficiency and commenced this timely suit for refund in the amount of $1,600,000 plus interest in the United States District Court for the District of Connecticut. (R. 51)

The plaintiff-executor moved for summary judgment on the issue of liability in the district court. (R. 47) At that time the case contained the issue relating to the tax status of a widow's allowance which has since been conceded. On the issue which is involved here the district court, in Part II of its opinion (R. 94-102), held that the will did not contain a clear and unambiguous direction against proration of taxes in the residue, and accordingly, the Connecticut proration statute applied to the residuary shares, and the widow's trust being exempt from federal taxes should bear no part of them. (R. 98)

The district court also ruled in Part III of its opinion (R. 102-107), that the probate decree respecting proration with which it agreed in principle was not binding and conclusive upon a federal court in applying federal revenue laws. (R. 106)

Hence judgment was entered in the district court in favor of the plaintiff. (R. 111)

Each party appealed to the Court of Appeals for the Second Circuit, the appeal of the plaintiff relating only to the issue concerning the widow's allowance which it has now conceded. (R. 112, 113)

The Court of Appeals reversed the judgment of the district court (R. 124) and the plaintiff's petitions for rehearing and rehearing in banc were denied. (R. 125)

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Sec. 2056. Bequests etc. to surviving spouse 3a

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Sec. 1254(1) 7a

Sec. 1738. State and Territorial statutes and judicial proceedings; full faith and credit 7a

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SUMMARY OF ARGUMENT

POINT I

Congress in creating the marital deduction planned that it be measured in part by the law of the domiciliary State.

The Connecticut proration statute, on the basis of equitable principles requires that the widow whose bequest does not contribute to the tax burden should bear no part of it.

In Connecticut proration of estate taxes is the mandate of the legislature unless the testator directs otherwise by words so clear as to dispel all doubt of the testator's desires.

A will containing a direction to pay all death taxes from the residuary estate, such as the first sentence of Article One of Mr. Brewster's will, leaves a doubt concerning the testator's intention respecting proration between residuary gifts and therefore, the apportionment statute applies to them.

The second sentence of Article One is not a clear direction against proration between residuary shares because when written, all of them were equally taxable. The testator did not speak to that matter either in the will or codicil. Further the second sentence expresses an unwillingness of the testator to have residuary shares responsible for ultimate payment of death taxes and thus contradicting what is said in the first sentence.

The Court of Appeals purported to avoid the doubts that existed by a "construction" of the will thereby departing from the established principle that only a clear and unambiguous directive will prevent operation of the apportionment statute.

POINT II

The probate decree was rendered by a court of competent, in fact exclusive, jurisdiction. It was an authoritative court whose decisions by statute are entitled to full faith and credit unless reversed on appeal or set aside for fraud or lack of jurisdiction.

Decisions of the Connecticut probate courts, have been said by this Court, to determine finally as "against the world" all questions arising in the succession of estates in their possession. Their decrees are recognized as having an in rem effect.

The probate decree determining that the widow's share was not to bear the burden of estate taxes generated by the residuary properties, thereby fixing the amount of the marital deduction, was entitled to full faith and credit and was conclusive in the assessment of the federal estate tax.

Prior decisions of this Court and of the Courts of Appeal in the Third and Fourth Circuits and despite its decision in this case, in the Second Circuit too, support the result we urge.

The probate decree was neither collusive nor non-adversary and no issues of fact of that type remain in the case.

ARGUMENT

I.

THE CONNECTICUT PRORATION STATUTE IS APPLICABLE BETWEEN RESIDUARY SHARES AND HENCE THE WIDOW'S SHARE CANNOT BE REDUCED BY ESTATE TAXES ON THE RESIDUE.

The Connecticut apportionment statute was enacted in 1944 and became effective July 18, 1945; since then it has been amended only once and in a manner that did not affect so much of its language as is involved here. The statute operates on Connecticut and federal estate taxes that have been paid; it was not intended to affect the calculation of such a tax. The purpose of the statute was to achieve an equitable distribution of estate taxes, levied on account of inter vivos transfers, specific and pecuniary bequests and residuary gifts, making allowances for exemptions and deductions recognized by the taxing acts.

The marital deduction in the federal estate tax law was not created by Congress until the Revenue Act of 1948, so the Connecticut apportionment statute could not have been designed to have any impact on it. Under what is now Section 2056 of the Internal Revenue Code, (App. 3a) Congress allowed a bequest to a surviving spouse to be deducted in computing the taxable estate but prescribed that the deduction should not exceed fifty per centum of the adjusted gross estate nor more than the net value of the property passing unencumbered to the surviving spouse. The statutes also prescribed that in determining the net value of such property allowance must be made for the burden of death taxes which it carries.

In any decedent's estate, it is the domiciliary state which determines how the burden of death taxes is to be borne.

It may do so by statute as Connecticut has done in the case of its succession tax; under that taxing act the tax against each beneficiary is measured by and charged against his share. The proration of state and federal estate taxes, however, has been entrusted to the courts of probate as part of their function in overseeing the settlement of decedents' estates. (App. 9a) Surely Congress when it created the marital deduction was aware of these matters and that the amount of the deduction might well differ from state to state. It must have perceived that the amount would be affected by a widow's rights under the intestacy laws, and also by whether the domiciliary state did or did not have an apportionment statute, and further, by particular provisions of such a statute and the manner in which it was applied.

Thus the fact that a probate decree may affect the amount of a marital deduction and the amount of estate taxes assessable is brought about solely because Congress adopted the law of the State of Connecticut as a criteria for measuring the amount of the deduction in estates of decedents domiciled there. See *Riggs* vs. *Del Drago* (1942), 317 U.S. 95, where the Court said, at page 98:

> "• • • Congress intended that state law should determine the ultimate thrust of the tax. That Congress, from 1916 onward, has understood local law as governing the distribution of the estate after payment of the tax • • • is confirmed by § 812(d) of the Code, dealing with charitable deductions, which recognizes that estate taxes may be payable in whole or in part out of certain bequests, etc. 'by the law of the jurisdiction under which the estate is administered.' "

Also pertinent is the footnote on pages 98 and 99 quoting the Chairman of the Ways and Means Committee, *viz.*:

> "• • • We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. *This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution.*" (emphasis supplied)

In the instant case, the interest passing to the widow consisted of certain jointly-owned property, some pre-residuary bequests of real estate and personal property, and a bequest of residue. Article Nine of the will, as amended by the codicil, disposed of the residuary properties. By Part I thereof, one-third of the residue is bequeathed to a trustee to pay the income to the widow for life, and she is given a general power to appoint the remainder by her will; if this power is not exercised, the remainder passes to the testator's three children or their issue, *per stirpes*. The jointly-owned property, the outright pre-residuary bequests of real estate and personal property, and this residuary bequest qualify for the marital deduction and do not exceed fifty per cent of the value of the adjusted gross estate. By Part II of the residuary clause, the remaining two-thirds of the residuary properties are bequeathed in trust for the testator's grandchildren.

The Connecticut Supreme Court first considered the apportionment statute in *McLaughlin* vs. *Green*, 136 Conn. 138, where the issue was whether taxes attributable to certain inter vivos trusts should be prorated against them or paid out of the residue. The testator had directed in his will:

> "FIRST: I order and direct the payment of all succession, transfer and inheritance taxes from my residuary estate."

The court held that this language was not sufficiently clear to prevent the operation of the apportionment statute and to require payment of taxes attributable to the inter vivos trusts out of the residue.

Out of *McLaughlin* vs. *Green, supra,* came the principle that because of the equitable and remedial character of the apportionment statute, exception to it should be allowed only when there is a clear, specific and unambiguous direction against it. The Connecticut court relied upon *Matter of Mills,* 272 App. Div. 229, 233, 70 N.Y.S. 2d 746, quoting from the opinion in that case with approval. Incidentally, the Connecticut statute was modeled on the New York statute and the law in the two jurisdictions has developed similarly.[2] In subsequent decisions of the Supreme Court of Connecticut the principle that that application of the apportionment statute could be avoided only by a clear and unambiguous direction to the contrary became firmly established in the jurisdiction of the state. See *Jerome* vs. *Jerome* (1952), 139 Conn. 285, 93 A.2d 139; *New York Trust Co.* vs. *Doubleday* (1956), 144 Conn. 134, 128 A.2d 192; *Guaranty Trust Co.* vs. *New York City Cancer Committee* (1958), 145 Conn. 542, 144 A.2d 535; *Morgan Guaranty Trust Co.* vs. *Huntington* (1962), 149 Conn. 331, 179 A.2d 604.

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[2] *In Matter of Huntington,* (App. Div. - N.Y., 1962), 14 A.D. 2d 312, 316, the court said the New York law respecting tax apportionment is essentially the same as the law of Connecticut. Hence decisions of New York courts are persuasive in determining the construction and operation of the Connecticut proration statute. *Powers* vs. *Hotel Bond Co.,* (1915), 89 Conn. 143, 148; *Imperial Laundry, Inc.* vs. *State Board of Labor Relations,* (1955), 142 Conn. 457, 460.

The proration statute provides that in prorating estate taxes, "allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate • • •." (Gen. Stat. 12-401). (App. 9a) *Jerome* vs. *Jerome*, *supra*, was the first case before the Connecticut Supreme Court involving the apportionment statute and a marital deduction and it held that the excerpt from the statute quoted above required the full amount of the marital deduction to be allocated to the value of the widow's bequest. At page 292, the court said:

> "The proration statute authorizes the judge of probate, when preparing his schedule of proration, to make allowances for any deductions used in lowering the amount of the federal estate tax. While the statute does not specifically state to whom such allowances shall be given, the obvious inference is that it refers to those beneficiaries who received any property, interest or benefit, the value of which was used, by way of deduction, to reduce the amount of the taxable estate. In the case at bar, the application of the marital deduction will shrink the estate, for tax purposes, to substantially one-half its otherwise taxable size. Since the purpose for which the marital deduction was created was to permit the survivor to take, free of the federal estate tax, a share in the spouse's estate up to 50 per cent of its value, the deduction should properly be allowed as a credit against the value of the property passing to that survivor. 3 Locke & Kohn, *Connecticut Probate Practice*, p. 152. Only through the allocation of the entire amount of the marital allowance to the value of the widow's bequest will the intent as well as the spirit of the proration statute be met, for the statute is based on the equitable principle that the estate taxes

> should be borne by those whose bequests contribute to the tax burden and, conversely, that all those whose legacies do not in any way create or add to that burden should not be required to bear it. * * *"

Hence in the instant case, if the proration statutes do not apply as the United States contends, the entire federal estate tax is payable from the estate before the residuary is determined, the widow's trust of one-third of the residue bears one-third of the federal tax, and the amount of the marital deduction is accordingly reduced. On the other hand, if the proration statutes do apply as the executor contends, the amount of the widow's trust is determined without reducing the residue by the amount of federal taxes it generates; that trust being itself exempt from tax because it qualifies for the marital deduction, bears no part of such taxes; and the marital deduction is the full amount of the property passing to the widow.

So the basic issue is whether the Connecticut proration statutes apply, and that turns on whether the will contains a specific and unambiguous direction to the contrary. *New York Trust Co.* vs. *Doubleday, supra,* is a highly relevant and significant authority. In this case, the tax clause of the will read as follows:

> "I direct my executors to pay from my residuary estate all estate, inheritance, transfer, succession and other death taxes or other taxes in the general nature thereof which may be payable with respect to any property included in my gross taxable estate * * *."

A one-fifth part of the residue was given to the surviving widow, so the issue arose whether the tax clause quoted was so expressed as to prevent the application of the proration statute within the residuary estate itself. Thus the issue was identical with that presented here.

In deciding that the proration statute should operate within the residuary estate, the court first reiterated the general rule, at page 141:

> "We have said that a testamentary directive against the prorating of taxes must be clear and unambiguous, since the practical effect of such a directive is to increase the size of the gifts to some by shifting to others the burden of absorbing the tax. *Jerome* vs. *Jerome*, 139 Conn. 285, 289, 93 A.2d 139. Proration, then, is the rule, indeed, the mandate, to which exception is possible only if the testator clearly indicates otherwise."

The court then lent emphasis to this statement by saying further that when a will contains a tax clause, it must disclose just what lies in the testator's mind:

> "• • • so that all doubt as to the extent or limitation of his command may be completely dispelled."

Referring to the tax clause, the court then said, at page 141:

> "• • • At first blush, this language might seem to be sufficiently broad and inclusive to cover gifts of the residue itself as well as those resulting from specific devises and legacies. Upon reflection, however, there arises some doubt that this was the testator's intention. Since a doubt exists, the tax clause lacks the clarity necessary to make the proration statute inoperative as to the residuary gifts. *Whatever may have been his unexpressed intention, the testator neglected to speak clearly upon the question of proration as it applies to the residuary gifts. The directive in the will that all estate taxes be paid from the residue is not a directive against the prorating of estate taxes among residuary gifts.*" (emphasis added)

So under the law of Connecticut the issue here is narrowed to this question, *i.e.*: Did the testator speak clearly upon the matter of proration as it applies to the residuary gifts?

The complete answer is that the testator did not speak to that matter at all. The will was executed on June 5, 1958. The residuary trusts for widow and grandchildren were similarly taxable; no attempt was made to qualify the widow's trust for the marital deduction, so there was no reason or room for proration between residuary shares. Manifestly the matter of proration between residuary shares was not in the testator's mind and could not have found any expression in the words of Article One. The will was silent on that subject.

On July 1, 1958, the codicil was signed. The single change of importance here was the conversion of the widow's trust into one that qualified for the marital deduction. The Court of Appeals held that this modification by the testator does not bespeak any intention to alter his wishes expressed in Paragraph "One" which was specifically republished and confirmed. With this statement we are in complete agreement and we believe it reflects the law of Connecticut. See *First National Bank* vs. *Baker* (1938), 124 Conn. 577, 1 A.2d 283; *Griffith* vs. *Adams* (1907), 106 Conn. 19; *Colt* vs. *Colt* (1865), 32 Conn. 422.

Also the Court of Appeals referring to Paragraph One says, "Thus in summary the testator specifically wished to have death taxes paid out of his estate but without proration." Were we to concede, arguendo, that he directed death taxes on inter vivos transfers and preresiduary bequests to be paid out of the residue, we cannot admit that he has spoken clearly upon proration as between the residuary gifts. Since that was not a subject which he had in mind, he cannot be understood as having spoken about it. At very least, he failed to speak

so precisely that "all doubt as to the extent or limitation of his command" was completely dispelled. Hence as the district court held, under the law of the State of Connecticut, the proration statute applies to gifts within the residue.

The district court in considering this aspect of the case had the benefit of the opinion of the New York Court of Appeals in a strikingly parallel case, *Matter of Shubert* (1962), 10 N.Y. 2d 461, 180 N.E. 2d 410. This case had not been decided when the probate court acted. In the *Shubert* case, a codicil had altered certain of the residuary bequests to render them charitable and tax exempt and it had also republished the will without changing the tax clause. At page 475, the New York Court of Appeals said:

> "In considering the testator's intention at the time he drafted the tax clause, one further aspect of his original will should be considered. Under the 1949 will, prior to amendment by codicil, the four equal residuary trusts therein set up were fully taxable, * * *.
>
> "Under the original scheme, then, taxes would have been paid out of the capital of the trusts, for there is no apportionment of taxes between income beneficiaries and remaindermen of a fully taxable trust (Decedent Estate Law, § 124(2)). Each of the four trusts under the original will thus had the same value for estate tax purposes, and the tax clause, drawn as part of the original will, was meaningless insofar as intra-residuary apportionment was concerned. Whether apportionment was directed or not, the tax burden on each residuary trust would have been the same. The residuary bequests were changed by codicil. Hence it is difficult to perceive how the clause now may be read as an express direction to accomplish something totally unnecessary when it was drafted."

The Court of Appeals for the Second Circuit concludes the portion of its opinion dealing with this subject by what appears to be a retreat from its position that Paragraph One had the

same meaning after the codicil as it had before. Notwithstanding this, it seems to say that Paragraph One acquired a different meaning because the will,

> "• • • would speak as of *the date of death* when proration under the Connecticut statutes presented a definite problem to be guarded against." (emphasis supplied)

We know of no other authority suggesting that a will or codicil may acquire a meaning it did not hold at execution by reason of the circumstances existing at the moment of death. We can attribute no other meaning to the words quoted.

To further buttress its ultimate conclusion, the court makes these statements:

(a) "• • • the testator had ample opportunity to consider on republication any further special tax treatment for his wife's one-third share had he desired to do so."

(b) "The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds."

The first of these has the character of a finding of fact made by an appellate court without any evidence; it is pure speculation and for that reason we submit should be disregarded. But the significance of each quotation is that it evidences a complete misapprehension of the law of Connecticut. Tax exemption for a gift qualifying for the marital deduction is not "special tax treatment" but the ordinary rule. A testator does not have to "disclose an intention" to secure the full benefit of the exemption. It has been granted to the spouse by the Connecticut legislature and can be taken away from the spouse only by words of the testator so plain and specific that they dispel all doubt as to his wishes. If the testator is silent or neglects to use specific words or to choose them carefully, the spouse has the full benefit of the deduction.

There is still another reason why Article One cannot be regarded as an unambiguous declaration against proration within the residue. It is evident from Article One that the testator did not want any death taxes charged against preresiduary transfers. But if the testator's phrase "beneficiaries of this will" used in the second sentence be understood as including residuary legatees, then the second sentence reflects a wish that they too not be held for the "ultimate payment" of death taxes. This wish is a contradiction of the first sentence. A similar conflict was the controlling factor in the decision in *Matter of Pepper* (1954), 307 N.Y. 242, 120 N.E. 2d 807 where the tax clause in the will read as follows:

> "THIRD: All of the bequests hereinafter made shall be paid over and all of the trusts hereinafter created shall be set up by the executors and trustees, *freed from all deductions for inheritance, transfer, estate, or any other tax* imposed by any Commonwealth or State of the United States or Government of the United States for the inheritance or transfer of interest in a decedent's estate, which tax, including any tax payable by virtue of insurance on my life or any gifts or disposition of assets which I may have made during my life, *I will and direct shall be paid out of my residuary estate.*" (emphasis supplied)

In later paragraphs of the will, the testator created several trusts, each containing a share of the residuary, and one of which, a trust for his widow, qualified for the marital deduction. In holding that the apportionment statute must be applied, the Court of Appeals said at page 250:

> "• • • The first clause directing the trusts to be set up free of tax and the last clause directing all taxes to be paid out of the residuary estate cancel out or neutralize each other. The net result is that this will does not contain a direction against statutory apportionment. However, in deciding this case we need not go that far. We need

only hold that it does not contain a clear and unambiguous direction to that effect. There is a strong policy in favor of statutory apportionment. Those who contend against apportionment must bear the burden of proof (*Matter of Kaufman*, 170 Misc. 436; *Matter of Dettmer*, 179 Misc. 844) and the direction in testator's will must be clear and unambiguous. As was said in *Matter of Mills* (189 Misc. 136, 141, *aff'd.* 272 App. Div. 229, *aff'd.* 297 N.Y. 1012, *supra*): 'In case of doubt as to what the will means on the subject of taxes the statutory direction to apportion is absolute.' • • •"

Similarly, in the instant case, if the testator in using the phrase "beneficiaries of this will" in the second sentence meant to include residuary beneficiaries, then the language of that sentence reflects a desire that they too not be required to bear the burden of death taxes, and the first and second sentences are in direct conflict. This was apparent to the guardian-ad-litem, the probate court and the district court, and was one reason each of them concluded that proration between the residuary gifts was necessary. (R. 77, 82)

The Court of Appeals said that this doubt arose not from the language of the will but from two fallacious assumptions. The first of these, it said, was that

"• • • 'beneficiaries' in the second sentence are intended as the residual legatees only • • •"

(R. 120)

But the doubt arises and exists so long as "beneficiaries" includes the residuary legatees. Whether "beneficiaries" refers to residuary legatees among others, or to them alone, the second sentence reflects an unwillingness of the testator that they be required to ultimately pay any death taxes. The conflict with the first sentence is patent.

The Court of Appeals cites *In the Matter of Ellen W. Duryea*, 277 N.Y. 310, 317, 14 N.E. 2d 369, 371 (1938), and

calls the reasoning persuasive. The case concerned a will and a codicil which altered certain preresiduary gifts in such a way that the beneficiary finally received a power of appointment over the remainder of two trust funds. The tax clause in the original will, which was not changed by the codicil, read as follows:

> "I direct that all transfer, inheritance and estate taxes be paid out of my residuary estate and that all the foregoing gifts, legacies and devises shall be free from and without deduction of any such taxes."

The thrust of the truncated quotation in the court's opinion (R. 122) is that if the donee of the power failed to exercise it and thus the gifts-over made by the testatrix became effective, the death taxes on such gifts should be paid out of the residuary estate. In other words, the meaning of the tax clause was unaffected by the codicil. The rationale of the decision is the same as that in *Matter of Shubert, supra.*

The Court of Appeals refers to its own decision as "construing Paragraph 'One' to direct that the proration laws of Connecticut do not apply". This aptly describes the opinion which is based upon conjecture and speculation. We have previously referred to the suggestion of the Court of Appeals that the testator did not want the widow's share so "grossly disproportionate" to the provision for his grandchildren. There is no factual or evidential basis for their supposition. Much more reasonable is the view of the court in *Dodd et al, Executors* vs. *United States,* (C.A. 3) 345 F.2d 715 in imputing to the testator an overriding intention that his widow and estate should have the full benefit of the marital deduction. The employment of the process of construction by the court below serves no purpose; it only emphasizes its disregard of the law of Connecticut, which by its insistence upon "a clear and unambiguous direction" dispelling all doubts, forbids the use of surmise as a substitute.

II.

THE DECREE OF THE CONNECTICUT PROBATE COURT WITH RESPECT TO PRORATION OF THE FEDERAL ESTATE TAX CONCLUSIVELY ESTABLISHED FOR THESE TAX PROCEEDINGS THE AMOUNT OF THE SURVIVING SPOUSE'S INTEREST IN THE ESTATE.

No appeal having been taken from the probate decree, the latter fixed beyond the power of any court to change, except for fraud, the amount of the widow's share in the residue of the estate. It similarly determined that her interest in the residue should not bear any part of the federal estate tax attributable to the residue. The issue under this point is whether this adjudication by the probate court is a conclusive determination in these tax proceedings of the amount of the marital deduction. The Court of Appeals and the district court both concluded that the decree of the probate court was not binding and conclusive in this matter. The reasons advanced for their conclusions were: (1) The probate court is not a court of record; (2) Most of the judges of the probate courts are laymen, not lawyers; (3) Decisions of probate courts are not binding on the state's higher courts; (4) Decisions of probate courts are subject to collateral attack in another probate district.

In answer to these reasons, we submit:

(1) The probate court in Connecticut is a court of record.

Lillico vs. *Perakos*, (1965), 152 Conn. 526, 532;
Willis vs. *Keenan*, (1956), 144 Conn. 33, 51;
Shelton vs. *Hadlock*, (1892), 62 Conn. 143, 151;
Locke & Kohn, *Connecticut Probate Practice*, Vol. 1, Sections 16 at p. 30, 18 at p. 33 and 19 at p. 35.

See also the various provisions of the Constitution and General Statutes of Connecticut (Revision of 1958) as amended through the year 1961 relating to the organization and powers of probate courts which are collected and set forth at pages 12a-14a of the appendix to this brief and show beyond peradventure that such a court has all the attributes of a court of record.

(2) A substantial number of probate judges in Connecticut are not lawyers. There is no constitutional or statutory requirement in Connecticut that the judge of any court of the state be a lawyer or have had any legal education; nor are we aware of any constitutional or statutory provision affecting the federal judiciary which establishes such a prerequisite for judicial appointment. The effect to be given a particular probate court decree cannot be determined by counting the number of probate judges who are laymen. An exception to the statute cannot be carved out of the full faith and credit doctrine (28 U.S.C. § 1738; App. 7a) which turns upon the quality of the education or training of the judge. And parenthetically may we emphasize that the probate judge who passed the decree involved here was and is a lawyer of the highest repute for learning and of vast experience in the law; no one in the State of Connecticut would have been more competent than he to render a conclusive decree.

(3) A probate court decree is not binding on the appellate court in the event of an appeal any more than the decision of the Court of Appeals in these proceedings is binding upon this Court. *Heiser* vs. *Morgan Guaranty Trust Co.*, (1963), 150 Conn. 563, 192 A.2d 44, does not support the statement for which cited by the Court of Appeals. The fact is, that Section 45-9 of the General Statutes of Connecticut (App. 13a) provides:

> "• • • All proper orders, judgments and decrees of courts of probate, rendered after notice and from which

no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud."

(4) Since probate courts are courts of limited jurisdiction, decrees of those courts can be collaterally attacked for want of jurisdiction, as in *Culver's Appeal*, (1880), 48 Conn. 165, 172, upon which the Court of Appeals relies. But collateral attack upon probate decrees is limited to cases of fraud or want of jurisdiction. In *Gallup, Trustee* vs. *Fox* (1894), 64 Conn. 491, the court pointed out at page 493 that the record of a court of probate or of any other inferior court is only *prima facie* evidence of jurisdictional facts

> "but of any material facts upon which it adjudicates, its judgment imports absolute verity, as fully as does the judgment of a court of general jurisdiction."

The rule applied in Connecticut with respect to the effect of probate court decrees is succinctly stated in *Goodno* vs. *Hotchkiss*, (D.C., Conn., 1916), 237 F. 686, at page 697:

> "Under the decisions of the Connecticut courts, collateral attacks upon decrees of courts of probate have been limited to cases of fraud or want of jurisdiction; but in all other cases, including cases of distribution, such decrees have been uniformly and consistently treated as judgments of courts of competent jurisdiction and in the nature of judgments in rem, and conclusively bind the subject-matter in controversy against all persons or their privies who have any interest in the subject-matter. • • •"

See also: *State of Connecticut* vs. *Blake, Trustee* (1897), 69 Conn. 64, 78;

Hall vs. *Hall*, (1917), 91 Conn. 514, 521;

Johnes vs. *Jackson, Executor*, (1895), 67 Conn. 81, 90.

In *Tilt* vs. *Kelsey*, (1907), 207 U.S. 43, 56, 57, this Court held that it was within the power of a sovereign state "to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein". It added that the State of Connecticut had given such conclusive effect to its probate court decrees.

Although *Tilt* vs. *Kelsey*, dealt only with the respect which the courts of another state must give to a Connecticut probate decree, it is clear the federal courts must treat it similarly. See Constitution, Article IV, Section 1, and the statute implementing it, 28 U.S.C. § 1738. (App. 7a) The familiar language of Judge Brandeis in *American Surety Company* vs. *Baldwin* (1932), 287 U.S. 156, 166, is pertinent:

> "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts."

And, during the intervening years, its strength has not diminished. See *Durfee* vs. *Duke* (1963), 375 U.S. 106.

This Court has consistently given full faith and credit to state court decrees establishing property rights and interests. In *Uterhart* vs. *United States* (1916), 240 U.S. 598, 603, it held that a New York decree construing a will was binding in a tax proceeding for the reason that such a decree "determines not only legally but practically the extent and character of the interests taken by the legatees." Similarly, in *Freuler* vs. *Helvering* (1934), 291 U.S. 35, this Court held that the decision of a California court, obviously similar to a Connecticut probate court, determining that annual deductions for depreciation of the trust property should have been taken from gross income

before making distributions to life income beneficiaries established the law of California respecting the amount distributable to those beneficiaries; and, since the beneficiaries' rights were property rights, the decision of that court determined the amount distributable for purposes of the federal income tax laws. Also, in *Blair* vs. *Commissioner* (1937), 300 U.S. 5, this Court said, at page 9:

> "SECOND: The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. • • • It matters not that the decision was by an intermediate appellate court. • • • In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. • • •"

See also: *Helvering* vs. *Stuart* (1942), 317 U.S. 154, 161.

In *Gallagher* vs. *Smith* (C.A. 3, 1955), 223 F.2d 218, the court in an effort at clarification of the various Courts of Appeals decisions in this field, classified the situations involving the application of state law into three groups: (a) situations in which federal criteria are imposed; (b) situations not involving a peculiar federal rule on the one hand or property rights on the other but merely a determination of some other question of law or fact asserted to be involved in the federal tax case; and (c) situations "in which a state court has deter-

mined the rights of the parties to income or other property involved in the tax litigation and the tax is imposed by the Internal Revenue Code solely upon the person entitled to the income or other property under the state law," there being no federal criteria imposed. The Court of Appeals concluded that it is only in the third group that binding effect must be given to a state court decree in determining federal tax liability.

A similar analysis was made and conclusion reached in Teschner, *State Court Decisions, Federal Taxation and the Commissioner's Wonderland: The Need for Preliminary Characterization,* in the February 1963 issue of Taxes — *The Tax Magazine.* In its conclusion the article says of the third class of cases:

> "(3) *Where the state courts have determined in rem property rights upon which the federal tax is predicated* — In such cases, a decision by a state court which acted within its jurisdiction is conclusive upon the point for all purposes, including federal tax purposes. Here, by definition, one of the federal criteria for decision necessarily depends upon those property rights. The federal courts not having any power to affect the property rights themselves, it is nonsensical for courts to talk of 'disregarding' them 'for federal tax purposes.' Even in the fairyland which the Commissioner seeks, he may disregard only the state adjudication and may not disregard the fact that the ownership adjudicated in the state court is one of the facts of life."

We submit that the decisions of this Court require that conclusive effect in this action be given to the probate decree with respect to proration because that decree is an *in rem* determination of the widow's property rights. This position is further supported by decisions involving the identical issue

which is present in the instant case namely, the effect of proration on the amount of the marital deduction. In *Pitts* vs. *Hamrick*, (C.A. 4, 1955), 228 F.2d 486, at page 490, the court said:

> "Whatever be the general law of South Carolina with respect to the matter, however, the decision of the probate court, which has not been appealed from, has settled the law, so far as this estate is concerned, and has vested in the widow her one-third free and clear of federal estate taxes. There is no showing that it was entered as a result of collusion or fraud or in a non adversary proceeding. Its effect was not merely to free the widow's share of responsibility for estate tax but to direct that this tax be paid from other shares. In other words, it fixed the amount of the widow's share of the estate; and whether this was done erroneously or in accordance with law, the amount of her share has been fixed thereby and the shares of other distributees have been decreased accordingly. As the amount which the widow will thus receive does not exceed one-half of the adjusted gross estate, and as she received it under the law of the state by decree of one of its courts, the estate is entitled to deduct it in computing the federal estate tax. Action of the probate court, even if erroneous, is valid unless reversed. • • •"

To the same effect are:

Estate of E. V. Babcock vs. *Commissioner*, (C.A. 3, 1956), 234 F.2d 837;

Weyenberg vs. *United States*, (D.C., E.D., Wis., 1955), 135 F. Supp. 299, 302;

Gordon vs. *United States*, (D.C., W.D., Mo., 1958), 163 F. Supp. 542;

Martinson vs. *Wright*, (D.C., Idaho, 1959), 181 F. Supp. 534;

Smith vs. *United States,* (D.C., W.D., S.C., 1959), 59-2 U.S.T.C. 11,907;

Provident Trust Co. of Philadelphia, Executor vs. *United States,* (D.C., E.D., Pa., 1958), 1958-2 U.S.T.C. 11,815; *aff'd* on other grounds (C.A. 3, 1959), 268 F.2d 779.

Apparently recognizing that the probate court decree can have a conclusive effect, the United States alleged in its answer that the decree of the probate court in connection with the proration "was the result of a proceeding which was collusive and/or non-adversary in nature." (R. 84) The law presumes that court proceedings are regular and valid and the burden of proving that the probate court decree was collusive rests on the Government. *Northwest Security Nat. Bank of Sioux Falls* vs. *Welsh,* (D.C., S.D., 1962), 203 F. Supp. 263, 266. Where collusion is asserted by the United States, it is incumbent upon it to produce at least some evidence to that effect. *Mary K. Miller* (Tax Court, 1963), 22 T.C.M. 1081; *Estate of Farish* vs. *United States,* (D.C., S.D., Texas, 1964), 64-2 U.S.T.C. 12,255. It is beyond dispute that the District Director of Internal Revenue, some twelve days before the probate hearing received from the attorneys for the executors, copies of the latters' application for proration of estate taxes and their proposed computation of the proration and notice of the hearing before the probate court. Thereby the executors made a complete disclosure of their views and position to the Internal Revenue Service. This is admitted by the Government's answer. (R. 8, 26, 75, 84) No evidence has been offered by the Government in this litigation by affidavit or otherwise in support of its allegation that the probate proceeding was collusive and non-adversary. And despite the court's failure to make a finding of fact on this issue, the Government's allegation indeed appears to be a hollow claim; it

should not be permitted at this late date to assert that a question of fact still exists. (R. 84)

Under the authorities that have dealt with similar situations, we submit that the probate proceedings here cannot be regarded as collusive or non-adversary. Thus in *Gallagher* vs. *Smith, supra,* at page 224, the Court of Appeals in the Third Circuit said:

> "• • • Moreover, other courts have taken the view that a binding state judgment adjudicating property rights must be given conclusive effect in tax cases even though it was entered by consent, and this appears to be the view of the Supreme Court. • • •
>
> "Whatever may be the case with respect to consent decrees, however, it is clear that if the question at issue is fairly presented to the state court for its independent decision and is so decided by the court the resulting judgment if binding upon the parties under the state law is conclusive as to their property rights in the federal tax case, regardless of whether they occupied adversary positions in the state court or were all on the same side of the question. • • • we think that the fact that the parties all favored the same result in the state court is relevant only so far as it is evidence of collusion and should not in and of itself vitiate in the federal court such conclusive effect as the state law gives to the judgment with respect to the property rights determined by it. For if in the absence of fraud such a judgment does determine the rights of the parties in the property they must thereafter live with it so far as their enjoyment of the property is concerned. • • •
>
> • • •
>
> "• • • We think the necessary conclusion is that whether the proceeding was adversary or non-adversary

is not the test of conclusiveness in these cases but rather whether the judgment is an adjudication by the state court of a property right upon which solely the federal tax is imposed, which adjudication was and is final and binding upon the parties under the state law, and which was not obtained by collusion for the purpose of defeating the tax."

The same court considered the subject again in *Estate of I. G. Darlington* vs. *Commissioner*, (C.A. 3, 1962), 302 F. 2d 693 and said at page 695:

"We have also held squarely, in two of the three cases cited above, *Beecher and Gallagher*, that in order for the state court to settle conclusively the property question under state law and by that to fix the tax consequences under federal law, it is not necessary that the adjudication be the result of a contest in which one party says yes and another no. • • •

"There is not the slightest indication of a collusive arrangement here. All parties were summoned; the matter was presented in open court at a regular session thereof. Because the petitioner's request did not develop into a fight between the parties interested in the estate does not make the adjudication any less conclusive. We think it pretty clear that if anybody changes his mind concerning the result reached in the state adjudication he will have a bad time trying to avoid the effect of the Delaware County Orphans' Court's decision."

Similarly in *Goodwin's Estate* vs. *Commissioner*, (C.A. 6, 1953), 201 F.2d 576, the court recognized the absence of an active contest in the probate court and said:

"• • • Clearly the Probate Court proceeding was not an active and genuine contest, for every party to the proceed-

ing agreed that the claims were valid. However, the petitioner was a party having an interest adverse to the interests of the daughters. As widow of the decedent, petitioner was entitled to one-third of the net estate administered in the Probate Court after payment of claims against the estate. Section 10503-4, General Code of Ohio. The three daughters were entitled to share equally in the remainder of the estate. It is undisputed that the payment of the claims of the daughters reduced the distributive share of the widow over $30,000. The amounts paid the daughters upon their respective claims exceeded the distributive share that they would otherwise have received by varying amounts, by far the largest excess over her distributive share having been received by Frances G. Gustafson. The other two daughters therefore had an interest adverse to the allowance of the claim of Frances G. Gustafson. As the estate was solvent, the widow and daughters were the only interested parties in the proceeding with reference to the allowance of claims.

"The decree of the probate court was rendered after a hearing of which all parties had notice, and in which oral testimony was taken. While consent to the entry of the decree was given, it was given 'by all parties having an interest adverse to the claimant.' • • •

• • •

"• • • The Probate Court had exclusive jurisdiction of the subject matter. • • • It was empowered to determine all questions of fact underlying its decisions. • • • While an appeal from the order of the Probate Court could have been taken to the Court of Common Pleas, no appeal proceedings were instituted. The Probate Court's decision by its allowance of the claims substantially and adversely affected the property rights of the three beneficiaries

of the estate. This was undeniably a decision on the merits and the Regulations were squarely applicable."

To the same effect are:

National Bank of Commerce of Norfolk, Executor vs. *United States,* (D.C., E.D., Va., 1958), 58-1 U.S.T.C. 11,763;

Stackpole vs. *Granger,* (D.C., W.D., Penn., 1955), 136 F. Supp. 382;

Weyenberg vs. *United States, supra;*

Northwest Security Nat. Bank of Sioux Falls vs. *Welsh, supra;*

Estate of Farish vs. *United States, supra;*

To say that only a case which is contested in the courtroom is an adversary proceeding is to accept appearance rather than substance. The appearance of an adversary proceeding is a prime characteristic of collusion in legal proceedings. The basic element of an adversary proceeding is that the legal or property rights of one or more persons may be affected adversely. The State of Connecticut and John Jones are no less adversary in a manslaughter case because John Jones chooses to agree with the State and plead guilty; in the instant case, the widow and the grandchildren were no less adversaries because the guardian-ad-litem for the grandchildren, after careful consideration of the case pursuant to his obligations to his wards and the court, chose to agree with the executor's position. Clearly, by the decree of the probate court, the widow's property rights in the decedent's estate were increased at the expense of the grandchildren's rights. This is the essence of an adversary proceeding, not the mere appearance of contest. To adopt the words of the court in the *Gallagher* case, "in the absence of fraud such a judgment does determine the rights of the parties in the property" and so "they must thereafter live with it so far as their enjoyment of the property is con-

cerned." It is this determination to which this court gave conclusive effect in *Uterhart*, *Freuler* and *Blair* and which this court said, in *Tilt* vs. *Kelsey*, *supra*, that Connecticut probate courts could "determine finally as against the world."

After the decision in the case at bar, a different panel of judges of the Court of Appeals for the Second Circuit decided *Commissioner* vs. *H. J. Bosch*, (C.A. 2, 1966), 363 F.2d 1009. The amount of a marital deduction was at issue. The court held that a judgment of the Supreme Court in New York authoritatively settled the rights of the parties not only for New York, but also for the application to those rights of the relevant provisions of federal tax law. The court in the *Bosch* case was able to distinguish the decision in the instant case only on the ground "that the determination of the Connecticut Probate Court was not authoritative in Connecticut." We submit that the distinction is clearly invalid and without any merit. Indeed the Government in its memorandum addressed to the petition for certiorari in this case states that the decisions in *Bosch* and here "cannot fairly be reconciled."

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and that the judgment of the district court in favor of the plaintiff should be affirmed.

Respectfully submitted,

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CONSTITUTION OF THE UNITED STATES

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

UNITED STATES CODE

TITLE 26. INTERNAL REVENUE CODE.

SEC. 2056. Bequests, etc., to Surviving Spouse.

(a) *Allowance of Marital Deduction.* For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.* —

• • •

4) Valuation of interest passing to surviving spouse. — In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section —

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession,

legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) *Life estate with power of appointment in surviving spouse.* — In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse —

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest for such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(c) *Limitation on Aggregate of Deductions.* —

(1) *General rule.* — The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 per cent of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of adjusted gross estate.* —

(A) *General rule.* — Except as provided in sub-paragraph (B) of this paragraph, the adjusted gross estate shall, for purposes of subsection (c)(1), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by sections 2053 and 2054.

(d) *Disclaimers.* —

(1) *By surviving spouse.* — If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

(2) *By any other person.* — If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

(e) *Definition.* — For purposes of this action, an interest in property shall be considered as passing from the decedent to any person if and only if —

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of sub-paragraphs (A) and (B) of subsec-

tion (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE.

SEC. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

SEC. 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affxing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

CONSTITUTION OF THE STATE OF CONNECTICUT

Article Fifth

Of The Judicial Department

Sec. 1. The judicial power of the state shall be vested in a Supreme Court of Errors, a Superiour Court, and such inferiour courts as the General Assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law.

Sec. 2. There shall be appointed in each county, a sufficient number of justices of the peace, with such jurisdiction in civil and criminal cases, as the General Assembly may prescribe.

Sec. 3. The judges of the Supreme Court of Errors, of the superiour and inferiour courts, and all justices of the peace, shall be appointed by the General Assembly, in such manner as shall by law be prescribed. The judges of the Supreme Court, and of the Superiour court, shall hold their offices during good behaviour; but may be removed by impeachment; and the Governour shall also remove them on the address of two thirds of the members of each house of the General Assembly: All other judges and justices of the peace shall be appointed annually. No judge or justice of the peace shall be capable of holding his office, after he shall arrive at the age of seventy years.

GENERAL STATUTES OF CONNECTICUT

(Revision of 1958)

TITLE 12. TAXATION

CHAPTER 218

PRORATION OF FEDERAL AND STATE ESTATE TAXES

SEC. 12-400. *"Persons interested in the estate," defined.* For the purpose of this chapter, "persons interested in the estate" includes all persons who may be entitled to receive or who have received any property or interest which is required to be included in the gross estate of a decedent or any benefit with respect to any such property or interest whether under a will or intestacy or by reason of any of the transfers, trusts, estates, rights, powers and relinquishment of powers, as severally enumerated in the United States internal revenue code.

SEC. 12-401. *Proration of estate taxes. Procedure.* (a) When it appears from any administration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a testator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instru-

ment, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate and except that, in cases where a trust is created or other provision made whereby any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax on both such temporary interest and the remainder thereafter shall be charged against and paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. In all cases to which this chapter applies, except as hereinafter provided in subsection (b), the executor, administrator or other person acting in a fiduciary capacity shall include as a part of the administration account or other proceeding in the probate court a computation of the proposed proration. Before determining such proration, the probate judge shall, except as hereinafter provided in subsection (c), appoint a time and place for a hearing thereon and shall cause such notice of such hearing to be given to the parties in interest as he directs. In making the proration herein provided for, the credit allowed by the law imposing the federal estate tax for gift taxes paid, or for any estate, inheritance, legacy or succession taxes actually paid with respect to the estate to any state or territory or the District of Columbia, shall be assumed to apply pro rata to all parts of the gross

taxable estate subject to such federal estate tax. (b) If the judge of probate finds with or without a hearing thereon, from the administration account or other evidence available to and satisfactory to him, including written consents by those to whom the tax has been charged, that the federal estate tax and Connecticut estate tax, if any, as finally determined, have been paid and that the ultimate burden of such tax or taxes has been borne by a party or parties in interest in a manner satisfactory to them, or to their legal representatives, as evidenced by the written consent of such persons or of their legal representatives, no proration of the federal estate tax or Connecticut estate tax shall be made unless specially requested by any party in interest. (c) Upon receipt of the computation provided for in subsection (a), the probate judge shall make a determination of the proration of the federal estate tax, if any, in the manner provided by subsection (a), except that, if all parties affected by such proration or their legal representatives endorse upon such computation their approval thereof, no hearing need be held thereon, but such determination may be made ex parte.

SEC. 12-402. *Tax to be paid by executor or administrator.* So far as is practicable, the tax shall be paid by the executor or administrator as such out of the estate before its distribution, unless the decedent's will, if any, otherwise directs. When any property required to be included in the gross estate does not come into the possession of the executor or administrator as such, he shall recover from whoever is in possession or from the persons interested in the estate the proportionate amount of such tax payable by the persons interested in the estate with which such persons are chargeable under the provisions of this chapter, and the probate judge may by order direct the payment of such amount by such person to the executor or administrator.

SEC. 12-403. *Distribution by fiduciary.* No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any property or fund with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, heir-at-law, distributee or other person to whom such property is transferred is paid or, if the apportionment of tax has not been determined, until adequate security is furnished by the transferee for such payment.

SEC. 12-404. *Order directing payment of prorated amounts.* The probate judge, upon making a determination as provided in section 12-401, shall make an order directing the executor, administrator or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated so far as he is in possession of property or interests of such persons, and directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor, administrator or other fiduciary.

SEC. 12-405. *Appeal.* Any person aggrieved by any determination or order made by the probate judge pursuant to this chapter may appeal therefrom to the superior court in the same manner and with the same effect as from other orders or decrees of the probate court.

TITLE 45. PROBATE COURTS AND PROCEDURE.

CHAPTER 774

ORGANIZATION, POWERS, DUTIES AND GENERAL PROVISIONS

SEC. 45-4. *General powers.* Courts of probate in their respective districts shall have power to admit wills to probate and grant administration of intestate estates of persons who have

died domiciled in their districts and to call executors, administrators, trustees, guardians and conservators to account for and concerning the estates entrusted to their charge, and may make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the several provisions contained in this title. Upon the admission of any will to probate or the appointment of an administrator of the estate of any deceased person, the court of probate shall make a finding as to the domicile of such person at the time of death, and any person interested in such estate may appeal from such finding as provided in section 45-288.

SEC. 45-7. *Judge may call assistance.* In the determination of any matter pending before a court of probate, the judge may call to his assistance any judge of the superior court or court of common pleas or any other judge of probate.

SEC. 45-9. *Validity of orders, judgments and decrees.* Every order or decree of a court of probate made by a judge who is disqualified shall be valid unless an appeal is taken therefrom, as hereinafter specified. All proper orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud.

SEC. 45-12. *Record books, records and supplies.* Each judge of probate shall provide suitable record books and supplies for the court in his district. He shall cause a complete record to be made in such books of all orders passed by such court, and of all wills, inventories, distributions, accounts, bonds and returns made to or lodged with such court, and the expense of such record books and of such supplies as such judge deems necessary shall be paid, upon his order, by the town or towns composing such district in proportion to their several grand lists last perfected.

SEC. 45-15. *Certification of records and files.* The records and files of any court of probate may be certified by the judge, clerk or assistant clerk thereof, any one of whom is authorized to use and affix the seal of such court, and all copies of records and files so certified, with or without the seal of such court, shall be legal evidence.

SEC. 45-24. *Connecticut probate assembly; meeting; powers and duties.* There shall be an assembly of the elected and qualified acting judges of the courts of probate to be known as the Connecticut probate assembly, of which assembly all said judges shall be members. The annual meeting of said assembly shall be held on the third Wednesday in January in the supreme court room at Hartford. Other stated meetings of said assembly shall be held as provided in its bylaws. Special meetings may be called at such times and such places as said bylaws may provide. Said assembly shall transact any business which may properly come before such meetings and which pertains to said courts and the improvement of and uniformity in their procedure and practice and may adopt bylaws to govern said assembly and the meetings thereof and shall establish uniform rules, practice and procedure in said courts, subject to the rules established by the judges of the supreme court of errors under the provisions of Section 51-14. Any uniform rules, practice and procedure so established by said assembly shall be mandatory upon all courts of probate in this state. Said assembly shall clarify and revise the probate laws of the state and prepare a simple, clear and concise schedule of probate fees to the end that the administration of justice in the courts of probate may be simplified and expedited with maximum efficiency and minimum expense.

TITLE 51. COURTS.

CHAPTER 870

JUDICIAL DEPARTMENT

SEC. 51-1. *Composition of department.* The judicial department of the state shall consist of the supreme court of errors, the superior court, the court of common pleas, the juvenile court, the town, city, borough and police courts, the trial justice courts, justice of the peace courts, the traffic court of the district of Danbury and the probate courts.

SEC. 51-2. *Chief justice as administrative director. Powers and duties.* The chief justice of the supreme court of errors shall be the administrative director of the judicial department and responsible for the efficient operation thereof and of its constituent courts as defined in Section 51-1 and for the expeditious dispatch of litigation therein and the proper conduct of the business of said courts. He may require reports from the constituent courts of the department and may issue such orders and regulations as may be necessary for the efficient operation of such courts to insure the prompt and proper administration of justice. He may assign, reassign and modify assignments of judges of the superior court and the court of common pleas to hold regular or special sessions for the transaction of civil or criminal business within their respective courts, except as hereinafter provided. If any judge of the juvenile court is unable by reason of sickness, absence or other disability to perform the duties of his office, or if there is a vacancy, the chief justice may assign a judge of the court of common pleas or any judge of a municipal court to act in his stead until he resumes his duties or a new judge is designated. Any municipal judge assigned to the juvenile court shall be compensated at the per

diem rate of forty dollars for each day of his service to said court.

SEC. 51-33. *Punishment for contempt of court.* Any court may punish by fine and imprisonment any person who in its presence behaves contemptuously or in a disorderly manner; but no justice of the peace shall inflict a greater fine than seven dollars or a longer term of imprisonment than thirty days; and no other court shall inflict a greater fine than one hundred dollars or a longer term of imprisonment than six months.